No. 91-1748

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MALCOLM PIRNIE, INC.,
Petitioner,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE AMERICAN CONSULTING ENGINEERS COUNCIL, AMERICAN INSTITUTE OF ARCHITECTS AND NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF OF THE AMERICAN CONSULTING ENGINEERS COUNCIL, AMERICAN INSTITUTE OF ARCHITECTS AND NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Consulting Engineers Council ("ACEC"), the American Institute of Architects ("AIA") and the National Society of Professional Engineers ("NSPE") respectfully submit this brief amicus curiae in support of the pending petition for a writ of certiorari in this case. The purpose of this amicus filing is to bring to the Court's attention precisely how the decision below virtually eliminates the "window of correction" of the salary basis test, 29 C.F.R. § 541.118 (1991) and distorts the meaning of payment on a "salary basis" so that most employees can no longer be considered

exempt and are therefore entitled to overtime compensation. The Second Circuit's interpretation of the salary basis test, a regulatory creation of the Department of Labor ("DOL"), is wholly inconsistent with the purpose of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* It will also have a devastating financial impact on American businesses, including our members.

The American Consulting Engineers Council is a federation of 51 state and regional member organizations. These organizations have as their members approximately 4,500 firms representing over 175,000 employees in all facets of consulting engineering, from mechanical, electrical and structural, to environmental and civil engineering. ACEC's mission is to promote and protect the business interests of the consulting engineering profession. Malcolm Pirnie, Inc. ("Malcolm Pirnie") is a member of ACEC.

The American Institute of Architects is the largest and most influential professional association for architects, interns, and those directly involved in the practice of architecture. AIA has 296 state and local chapters and represents more than 56,000 members. Malcolm Pirnie is a corporate member of AIA.

The National Society of Professional Engineers is a multidisciplinary professional association with 54 state/territorial societies and 535 local chapters serving 75,000 individual members employed in industry, government, education, construction and private practice. NSPE's goal is to promote the interests of professional engineers in a manner consistent with the public safety, health and welfare. Many employees of Malcolm Pirnie are NSPE members.

Malcolm Pirnie's employment practices, including the ones at issue here, are fairly customary in the engineering and architecture professions. For example, like Malcolm Pirnie, many ACEC and AIA member firms pay engineers, architects and other exempt employees over-

time at a straight-time rate. This is a practice that has evolved over the years as a method to attract, fairly compensate and retain superior employees. In addition, like Malcolm Pirnie, most ACEC, AIA and NSPE members make deductions from leave banks for personal, sick or other reasons by the hour and have employees account for every hour worked on time sheets, to facilitate proper billing of clients and to comply with Federal, State and local government contract and auditor requirements. Each of these practices was called into question by the Second Circuit in *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), as being contrary to the salary basis method of payment. ACEC, AIA and NSPE believe that these practices, which are long established practices in the profession are entirely consistent with the salary basis method of payment and the FLSA.

SUMMARY OF ARGUMENT

The Second Circuit in *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, found that Malcolm Pirnie had a policy of deducting ("docking") pay of its exempt employees and therefore could not invoke the window of correction of the salary basis test, at 29 C.F.R. § 541.118. If this decision is permitted to stand, the exempt status of many employees, including professional engineers and architects, will be in doubt. The result is that many employees who are otherwise exempt may be entitled to overtime payments. Such an interpretation is contrary not only to the salary basis test but also to the intent and purpose of the FLSA.

ARGUMENT

I. THE SALARY BASIS TEST HAS BEEN INCONSISTENTLY INTERPRETED BY THE COURTS LEAVING EMPLOYERS WITHOUT CLEAR DIRECTION AS TO HOW THEIR SALARY SYSTEMS SHOULD BE STRUCTURED

The salary basis test has been an area filled with confusion over the past few years, with courts interpreting the requirements in many different ways. The consequences are potentially disastrous for all employers subject to the FLSA. This is because in order to be considered a bona fide exempt executive, professional, or administrative employee, an employee must be paid on a salary basis. 29 C.F.R. §§ 541.1(f), 541.2(e)(1), 541.3(e)(1991).

A. Deductions in Pay for Absences of Less than a Day

The salary basis test requires that in order to be considered salaried, an employee must:

> [r]egularly receive . . . each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. § 541.118(a). Some courts have held that even where no actual deductions have been made, if an employee is "subject to" a deduction, this is enough to destroy the exemption. *Abshire v. County of Kern*, 908 F.2d 483, 487 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785 (1991) (pay was "subject to" deduction); *D'Camera v. District of Columbia*, 693 F. Supp. 1208, 1212 (D.D.C. 1989) (test is whether pay is "subject to" a deduction, not the frequency with which pay is actually reduced); *Banks v. City of North Little Rock*, 708 F. Supp. 1023, 1025 (E.D. Ark. 1988) (no showing of actual deductions needed); *Hawks v. City of Newport News, Va.*, 707 F. Supp. 212, 215 (E.D. Va. 1988) (fact that policy of reducing pay is not applied to plaintiffs does not alter

the policy); *Knecht v. City of Redwood City*, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987) (test is whether pay is "subject to" a deduction); *Whitmore v. Port Auth. of N.Y. & N.J.*, 907 F.2d 20, 21 (2d Cir. 1990) (if an employee can be docked for fractions of a workday missed, then the employee is an hourly not salaried worker); *Harrison v. District of Columbia*, 30 Wage & Hour Cas. (BNA) 557 (D.D.C. 1991) (employee whose pay is subject to deduction for absences of less than a day is not salaried).

The Second Circuit, following *Abshire*, agreed that "an employee who can be docked pay for missing a fraction of a workday must be considered an hourly rather than a salaried employee." *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d at 615. On the other hand, other courts have determined that a salary is not "subject to deduction" where there are no actual deductions. *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991); *Harris v. District of Columbia*, 709 F. Supp. 238, 241 (D.D.C. 1989) (salary basis test not violated where no actual deductions had been made); *District of Columbia Nurses Ass'n v. District of Columbia*, 29 Wage & Hour Cas. (BNA) 868 (D.D.C. 1988) (deductions for absences of less than a day are made only in the occasional situation where a plaintiff has exhausted leave and takes leave without pay, plaintiffs are therefore compensated on a salary basis).

B. Overtime Compensation for Exempt Employees

Another area with considerable confusion is whether an employer, consistent with the salary basis test, can pay an employee overtime compensation. The salary basis regulation permits additional compensation in addition to the salary. 29 C.F.R. § 541.118(b). The regulation specifically states:

> It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional

> compensation besides the salary is not inconsistent with the salary basis of payment.

Id. Nevertheless, recent case law has called into question the common practice of paying some form of overtime compensation to exempt employees and whether it is consistent with the salary basis regulation. The Third Circuit, in *Brock v. Claridge Hotel & Casino*, 846 F.2d 180 (3rd Cir.), *cert. denied*, 488 U.S. 925 (1988), was the first court to question such practices. In that case, the court stated that additional compensation is "inconsistent" with the nature of executive status. *Id.* at 185. The Ninth Circuit in *Abshire* stated that its conclusion that battalion chiefs were not paid on a salary basis was supported by the fact that battalion chiefs received overtime pay or compensatory time for time worked outside their normal schedules. According to the court:

> Such additional compensation for extra hours worked is also not generally consistent with salaried status.

Abshire v. County of Kern, 908 F.2d at 486. *See also Hilbert v. District of Columbia*, 784 F. Supp. 922 (D.D.C. 1992); *Thomas v. County of Fairfax, Va.*, 758 F. Supp. 353, 364-65 (E.D. Va. 1991) (additional pay is inherently inconsistent with the common-sense understanding of salaried executive status); *Banks v. City of North Little Rock*, 708 F. Supp. at 1024 (payment of a fixed amount plus additional hourly wages for extra hours worked is not consistent with salaried status); *Knecht v. City of Redwood City*, 683 F. Supp. at 1312 (overtime compensation for minutes worked beyond a specified time is indicative of a non-salary basis of payment).

On the other hand, Section 22b01 of DOL's Field Operations Handbook[1] (May 12, 1970) states:

> *Extra Compensation paid for OT.*
>
> Extra compensation may be paid for OT to an exempt employee on any basis. The OT payment need

[1] The Field Operations Handbook is the operational manual which provides guidance for Wage and Hour investigators in conducting wage and hour, including FLSA, investigations.

not be at time and one-half, but may be at straight time, or flat sum, or on any other basis.

See also Wage and Hour Opinion Letters dated March 16, 1984, January 13, 1983, and March 3, 1970.[2] Other courts have also explicitly found that employees exempt under the Act may be paid overtime (on whatever basis) for hours worked beyond their regular schedule. *Pautlitz v. City of Naperville*, 781 F. Supp. 1368 (N.D. Ill. 1992) (supervisory overtime should be applauded rather than penalized); *International Ass'n of Fire Fighters, Alexandria Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230, 1232 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990) (practice of additional pay for each hour worked beyond regular schedule will not defeat exemption because it is expressly permitted by the labor regulations); *Hartman v. Arlington County, Va.*, 720 F. Supp. 1227, 1229 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990) (practice of overtime pay is expressly permitted by § 541.118(b)); *York v. City of Wichita Falls, Tex.*, 944 F.2d 236, 242 (5th Cir. 1991) (overtime payments do not defeat salaried status).

Many ACEC and AIA member firms like Malcolm Pirnie pay additional compensation to professional engineers and architects for "overtime" worked in excess of 40 hours (or less) in a workweek. Frequently this time is compensated on a straight-time basis. This practice is fairly common in these professions.

C. Deductions from Leave Banks

Another issue in the salary basis test that has become uncertain is whether partial-day absences may be deducted from exempt employes' leave banks. Most, if not all, employers, including most ACEC and AIA member firms (and NSPE members), have leave banks (i.e. sick, vacation, personal) that may be drawn on in increments

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[2] Reprinted as Appendix A.

of less than a day. This is a standard practice in American industry. Still, a footnote to the *Abshire* case stated:

> A strong argument can be made that even if deductions were required only from fringe benefits such as leave time, and not from base pay, the affected employees would still not qualify as "salaried."

Abshire v. County of Kern, 908 F.2d at 487 n.3. In *Service Employees Int'l Union, Local 102 v. County of San Diego*, 784 F. Supp. 1503 (S.D. Cal. 1992), the court found that "docking of an employee's leave time for absences from work is as contrary to the notion of salaried status as the docking of base pay." *Id.* at 1510. *See also Thomas v. County of Fairfax, Va.*, 758 F. Supp. at 366 (docking of one hour's leave affronts the concept of a salaried executive).

By contrast, in a July 17, 1987 Opinion Letter, DOL advised as follows:

> Generally, deductions for absences of less than a day are not permitted under the regulations for any reason. However, an employer can require an employee to substitute paid leave for such absences without losing the exemption for that week.

Ginsburg *et al.*, *Fair Labor Standards Handbook*, Appendix III at 160 (1989).

D. Recording of Time and Requiring Employees to Work Set Hours

One of the most disturbing portions of the *Martin v. Malcolm Pirnie, Inc.* decision is the court's conclusion that requiring exempt employees to work a fixed schedule and for a minimum number of hours is inconsistent with the salary basis test. Recently, another court also concluded that such requirements along with requiring exempt employees to record the time they work on some form of a time sheet or time card is inconsistent with "salaried status." *Service Employees Int'l*, 784 F. Supp. 1503, citing *Abshire*, 908 F.2d at 486 (a salaried employee is

compensated not for the amount of time spent on the job but rather for the general value of the services performed). *See also Morsch v. City of Los Angeles*, CV-0401 JGD (C.D. Cal. May 4, 1992).[3]

Such judicial interpretations are wholly inconsistent with how professional practices are conducted. Time sheets are frequently used by our members, in large part so that we can properly bill clients. Although exempt employees do and should enjoy flexibility in their work schedules, it goes without saying that some regularity is required so that clients, customers, etc. are able to make contact with employees when needed. The purpose of work schedules and set hours is generally to ensure that the firm has adequate coverage during core business hours and that staff will be available to work on projects in a collegial capacity. Furthermore, to suggest that by making exempt employees accountable for their time is somehow contrary to what it means to be an exempt executive, administrative or professional employee is ludicrous. In most ACEC and AIA firms all principals (including NSPE members), even top executives, account for their time on time sheets.[4]

E. Use of the Window of Correction

Finally, in addition to this confusion among the circuit Courts regarding just what constitutes a violation of the salary basis test, there is also considerable confusion over when an employer can avail itself of the window of correction and thereby avoid the catastrophic consequences of having made a mistake in its pay practices. Frequently, the mistake is due to the confusion created by the cases and opinions discussed above.

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[3] Reprinted as Appendix B.

[4] In fact, those firms who perform Federal, State and local government contracts *must* account for each hour worked in order to be reimbursed and for audit purposes.

According to the Second Circuit in *Martin v. Malcolm Pirnie, Inc.*, the window of correction provision:

> [a]llows an employer that makes an impermissible, but inadvertent, deduction to the compensation of an otherwise salaried employee to correct the error and thereby bring its compensation scheme into strict compliance with § 541.118(a).

Martin v. Malcolm Pirnie, Inc., 949 F.2d at 616. The Second Circuit found that, although Malcolm Pirnie had reimbursed employees who had had a relatively small amount of pay deducted and clarified its policy, Malcolm Pirnie had not "met its burden of proving that the 'window of correction' was available to it." *Id.* at 616. The Second Circuit appears to require that employees be compensated in accordance with all the salary basis requirements *before* an employer can avail itself of the window of correction, a requirement that all but obliterates the remedial purpose of the regulation. In effect, the Second Circuit precludes the use of the window of correction for most errors since the impermissible deductions must be not only "inadvertent" but "one-time or unintentional" as well. *Id.*

Furthermore, the window of correction, according to its clear language, allows correction of any deduction that is "inadvertent, *or* is made for reasons other than lack of work." 29 C.F.R. § 541.118(a)(6) (emphasis added). The plain language of the regulation states "inadvertent or", yet some courts have interpreted this language as requiring inadvertence *and* reasons other than lack of work, a reading advanced by the Department of Labor. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. 899 (S.D.N.Y.), *rev'd on other grounds*, 949 F.2d 611 (2d Cir. 1991). Other courts have directly rejected this interpretation. *Martin v. Pierce Processing, Inc.*, No. C-1-89-15 (S.D. Ohio Mar. 25, 1992)[5] (employer correctly used

[5] Reprinted in Petitioner's Petition for Writ of Certiorari at **Appendix F.**

window of correction and intended to pay employees on a salary basis where deductions were never made because work was lacking, but only when employees were voluntarily absent for personal reasons unrelated to whether work was available); *Keller v. City of Columbus, Ind.*, 778 F. Supp. 1480, 1487 (S.D. Ind. 1991) (if the window of correction applies, then it is as if the employees' salaries were never subject to reduction; if a policy allowed a deduction "for reasons other than lack of work" then the "window of correction" is open regardless of whether the error was inadvertent).

II. THERE IS AN URGENT NEED FOR JUDICIAL CLARIFICATION OF THESE CRITICAL ISSUES IN A MANNER WHICH WILL NOT RESULT IN A DEVASTATING FINANCIAL PENALTY TO EMPLOYERS AND A WINDFALL TO OTHERWISE EXEMPT PROFESSIONAL AND MANAGERIAL EMPLOYEES

Such confusing and divergent opinions on all of these issues (deductions from pay and leave banks, overtime compensation, recording of time and set hours, use of the window of correction) have had one net result: employers who desire to comply with the requirements of the FLSA and seek to have their policies comport with the salary basis test are at a loss. Employers are understandably reluctant to abandon long established practices, such as additional overtime compensation for exempt employees, in light of such contradictory opinions. This is especially true since many of these practices *benefit* employees, such as providing paid leave and additional compensation for overtime. It is ironic that these benefits are now at risk because of some opinions which distort the meaning of the salary basis test and lose sight of the purpose of the FLSA.

DOL has attempted to grant regulatory relief from the salary basis test to public employers. *See* 56 Fed. Reg. 45,824 *et seq.* (9/6/91, Interim Final Rule, Proposed Rule

and Request for Comments).[6] Yet the same public employer problems identified by DOL in its notice are equally applicable to the private sector as well.[7] DOL in its Federal Register notice recognized that the salary basis test had spawned a confusing and contradictory body of interpretive case law. DOL also detailed the confusion with the window of correction. DOL recognized that:

> These diverging judicial interpretations and accompanying confusion have developed resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees some of whom would clearly be exempt if duties and amount of compensation alone were examined.

56 Fed. Reg. at 45,829.

Just as public employers are subject to enormous exposure given these various interpretations, so too are private employers. While DOL has attempted to resolve these issues for the public sector, no such effort has been made on behalf of the private sector. The result is that many highly compensated professional and managerial employees who have no expectation of overtime pay, may in fact be entitled to such pay. Such a result is completely contrary to the purpose of the FLSA. The purpose of the FLSA is to "eradicate from interstate commerce the evils attendant on low wages and long hours of service in industries engaged in commerce or in the production of goods for commerce." *Wirtz v. Patelos Door Corp.*, 280 F. Supp. 212, 216 (E.D.N.C. 1968). The FLSA sought to

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[6] DOL's interim final regulations have been struck down by at least two courts because they failed purportedly to provide a proper notice and comment period pursuant to the Administrative Procedures Act. Presumably the courts objected to the retroactive provisions in the regulations. *See Service Employees Int'l*, 784 F. Supp. 1503; *Alex v. California*, 30 Wage & Hour Cas. (BNA) 1353 (E.D. Cal. 1992).

[7] The salary basis test, 29 C.F.R. § 541.118, is the same for public and private employers.

protect those members of the labor force who could not protect themselves from substandard wages and excessive hours. Those employed in executive, administrative and professional positions were deemed to not ordinarily need this protective legislation and thus were exempted from the minimum wage and overtime protection of the FLSA. *Id.* It is unlikely that Congress envisioned, in 1938, DOL enforcing the overtime provisions of the FLSA to "protect" highly paid exempt employees such as those at issue in the *Malcolm Pirnie* case.

The real irony in this case is that by all measures Malcolm Pirnie was and is a model employer. It paid the employees in question good salaries, provided leave benefits (vacation, sick and personal leave) and paid additional compensation for overtime.[8] But because its policies for deductions in pay for absences of less than a day were unclear it was investigated by DOL. It then attempted, as any good employer would, to remedy the problem by using the window of correction. The Second Circuit determined that it could not do so.

Given the confusing web of cases on the salary basis test, employers are at a loss over how to proceed. Furthermore, the potential liability in these cases for all employers, including our members, is enormous. Every time an employer's salary system is found to violate the salary basis test, the employer must go back, two or three years, and pay overtime at a rate of time-and-a-half for all hours worked by its exempt employees over 40 in a workweek. The devastating financial impact is not offset by

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[8] The district court below observed that it believed:

> [t]hat this matter came to the attention of the Department of Labor because overtime was paid to the professionals employed by MP to compensate them for many hours worked beyond a normal forty hour workweek. It is somewhat ironic that none of this litigation would have occurred if MP had not been generous in its treatment of its exempt employees.

Dole v. Malcolm Pirnie, Inc., 758 F. Supp. at 908.

any societal purpose and is, in fact, completely contrary to the fundamental purpose of the FLSA. These damage awards do not benefit minimum wage or blue collar workers but rather fatten the pockets of already well-compensated executive, administrative and professional employees who neither earned nor expected this judicially imposed windfall.

The most serious and immediate problems can be rectified by this Court clarifying when the window of correction can be used by an errant employer. If an employer who makes a good faith mistake in its payroll practices can correct it without catastrophic consequences, the worst part of this problem will be solved. A ruling by this Court that the Second Circuit erred in holding that the window of correction was not available to Malcolm Pirine will substantially ameliorate the problems created by the lower court rulings on the various "salary" issues discussed herein.

Certiorari should be granted in this case. The issues presented affect not just professional engineers and architects, but the ever growing number of service industries in the U.S. The case has broad application to virtually every employer in the United States. The issues raised have become the subject of an increasing wave of litigation with enormous consequences. The case law in this area is hopelessly confused by conflicting circuit court interpretations with billions of dollars of potential back pay liability riding on the outcome. Furthermore, given the narrow reading, by many courts, of the window of correction even an employer who wants to correct errors in its payroll system may not be permitted to do so. The need for resolution by this Court has become critical as the current unsettled state of the law poses a severe threat to the continued viability of ACEC and AIA member firms (and NSPE members) as well as nearly all American employers. Accordingly, this Court should grant certiorari to clarify and resolve the important issues presented.

CONCLUSION

ACEC, AIA and NSPE respectfully request that for the foregoing reasons, Petitioner Malcolm Pirnie's Petition for Certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Mar. 16, 84]

84.195C/OLIR 3722

Dear

This is in reply to your correspondence of February 22 enclosing a copy of a letter from Mr. Gordon L. Rosby of the Engineers-Architects, Professional Corporation in Grand Forks, North Dakota. Your constituent requests information as to whether there are rules or regulations which govern the handling of overtime hours worked by salaried professional employees who are exempt under section 13(a)(1) of the Fair Labor Standards Act (FLSA). Mr. Rosby asks, for example, whether such employees should be given compensatory time-off for overtime hours worked.

Section 13(a)(1) of FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR Part 541, a copy enclosed. An employee may qualify for exemption as a bona fide professional employee if all the tests relating to duties, responsibilities, and salary, as discussed in section 541.3 of the regulations, are met.

In a telephone conversation with a member of my staff, Mr. Rosby was advised that employees who meet the requirements for the exemption for bona fide professional employees need not receive any additional form of compensation beyond the guaranteed salary required by the regulations for hours worked in excess of 40 in a workweek. Mr. Rosby was also advised that although it is not required by FLSA, an employer may provide additional benefits, such as compensatory time-off, bank credit hours, or monetary compensation, to such exempt employees when they work in excess of 40 hours in a workweek.

Since no additional form of compensation is required by FLSA for such exempt employees, there are no rules or

regulations which address the matter of your constituent's concern. We wish to point out, however, that where an employee does not qualify for this exemption, the employee must be paid in accordance with the monetary provisions of FLSA, including the payment of overtime premium pay for hours worked in excess of 40 in a workweek, unless exempt under some other section of the Act.

We trust that the above satisfactorily responds to your inquiry. Please let us know if you have further questions.

Sincerely,

WILLIAM M. OTTER
Administrator

JAMES L. VALIN
Assistant Administrator
Wage and Hour Division

83.367

[Jan. 13, 1983]

Dear ———

This is in reply to your letter of December 24, 1982, concerning the salary basis of payment requirement under section 13(a)(1) of the Fair Labor Standards Act (FLSA).

Your letter describes a proposed compensation plan your client wishes to adopt for certain professionals. Your letter asks us to presume that all other requirements for the professional exemption in section 541.3 of Regulations, 29 CFR Part 541 are met.

Your client's professionals would be guaranteed a salary of $500 per week, and in addition, $10 to $15 per hour extra pay for work performed over 40 hours in one workweek, or after 80 hours in a two-week period, or even after 160 hours in a month. If the professional works less than 40 hours in a workweek, such employee will receive the full salary of $500. Your client intends to take the permissible deductions from the professional's salaries as provided in section 541.118(a)(2)-(5) of 29 CFR Part 541.

We agree with your conclusion that the extra compensation that your client proposes to pay in addition to the salary is not inconsistent with the salary basis of payment and is in accordance with section 541.118(b). Further, we believe that your client's proposed compensation plan generally appears to meet the requirements in section 541.118.

However, we have some reservations concerning the provision in the "Compensation Agreement" allowing the employer to adjust the salary and extra compensation as determined by the employer. If, for example, such proviso were used to make frequent adjustments in compensation, it would raise a serious question as to whether these professionals were being paid "on a salary basis" within the meaning of the Regulations.

[Mar. 3, 1970]

Dear ———

This is in further reply to your letter of February 12, 1970, concerning whether additional payments for work in excess of 44 hours per week to otherwise bona fide exempt employees is in accordance with the requirement that such employees be paid "on a salary basis" under section 13(a)(1) of the Fair Labor Standards Act.

The information you have provided assumes that the employees concerned meet all the duty requirements for exemption as bona fide executive, administrative, or professional employees, as set forth in the appropriate section of Regulations, Part 541. Each employee is paid a predetermined salary of at least $140 a week which is not subject to reduction because of variations in the quality or quantity of the work performed and without regard to the number of hours or days worked. His salary is not reduced for working less than 44 hours in a workweek, except for certain allowable deductions set forth in section 541.118(a) of the regulations. You ask if payment on an hourly basis generally at straight-time rates for time worked in excess of 44 hours in a workweek would defeat the requirement that such an otherwise exempt employee is paid "on a salary basis."

Although employers are not required under the act to compensate bona fide exempt employees for overtime work, they may pay them for overtime if they wish. As you correctly pointed out in your letter, section 541.118(b) of the regulations indicates that additional compensation besides the required predetermined salary is not inconsistent with the salary basis of payment. Thus, the employer may pay for overtime work on an hourly basis, and this may be at straight time, at time and one-half, or some other multiple.

Your letter does not describe the type of work the exempt employees perform during their overtime hours. It should

be pointed out in this connection that the exemption will be defeated in any workweek in which the employee exceeds the percentage limitation on nonexempt work.

It should also be noted that where an employee's employment situation differs from that described in your letter, it will be necessary to consider his exemption status in the light of the facts and circumstances in his individual case.

Enclosed for your information are copies of Federal Register reprints concerning the effective date of the recently enacted increases in the minimum salary levels necessary for exemption as an executive, administrative, or professional employee.

If you have any additional questions in this or any other matter concerning the application of the Fair Labor Standards Act, you may find it more convenient to get in touch with our Regional Office at 907 U. S. Parcel Post Building, 341 Ninth Avenue, New York, New York 10001. That office will be pleased to offer every possible assistance.

Sincerely,

JOSEPH F. MCAULIFFE
Director
Division of Minimum Wage
and Hour Standards

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 91-0401 JGD

WILLIAM B. MORSCH,
Plaintiff,

v.

CITY OF LOS ANGELES,
Defendant.

ORDER DENYING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING THE PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed May 4, 1992]

On March 30, 1992, the defendant's motion for summary judgment, and plaintiffs' cross-motion for partial summary judgment came on for hearing. The Court has considered the papers filed, and the oral argument of counsel. The defendant's motion for summary judgment is DENIED; the plaintiff's cross-motion for partial summary judgment is GRANTED. This order is CERTIFIED for interlocutory appeal. The action is STAYED pending the outcome of the appeal.

Facts

On January 23, 1991, the plaintiffs filed their Complaint for Overtime Pay and Liquidated Damages Under the Fair Labor Standards Act ("Complaint"). The plaintiffs are, or within the three years prior to the filing of the Complaint, 88 fire protection employees of the City of Los Angeles, and bring this action on behalf of themselves and others similarly situated. The complaint alleges that the City violated the Fair Labor Standards

Act ("FLSA"), 29 U.S.C. § 201-219, as described below. There is no dispute between the parties on the essential facts.

During the period commencing August 15, 1986, until the present, the City employed plaintiffs and others similarly situated. The plaintiffs are Battalion Chiefs and Assistant Chiefs in the Los Angeles Fire Department whose primary duties involve the prevention of, preparation for, response to, and control of emergencies. Declaration of John C. Ware in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment at 37.[1] The plaintiffs are not involved in the formation of department policy, and do not have the authority to hire or fire employees or make hiring or promotion recommendations. *Id.* The hours worked by the plaintiffs are controlled by the City. Plaintiffs may not absent themselves from work during the day without the permission of higher authority. Absence without excuse is subject to discipline. When plaintiffs are absent from work for a period of less than one day, such absences are deducted from accumulated leave or overtime in six minute increments. Plaintiffs must record on departmental time sheets all time spent on duty and all leaves of absence. Plaintiffs are compensated for overtime on a hourly basis, not on a time-and-one-half basis. *Id.* at 38. Plaintiffs may be suspended from duty without pay as a disciplinary measure.

The City is required to pay them time-and-one-half overtime compensation pursuant to 29 U.S.C. § 207(a) and (k) and regulations of the United States Department of Labor. The City has failed to do so.

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[1] This declaration is unsigned. Presumably, this was merely an oversight. Defendants have not objected.

Discussion

I. The Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. Rule 56(c). Whether a fact is material is determined by looking to the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law . . . ." *Id.*

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Id.* at 256. Rule 56(e) provides that "[w]hen a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. Rule 56(e).

As the Supreme Court explained in *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 477 U.S. 574 (1986):

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."

477 U.S. at 586-87. A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish an essential element to that party's case, and on which that party would bear the burden of proof at trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23 (1986). The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S. H. Kress and Company*, 398 U.S. 144 (1970)).

Initially, it is the moving party's burden to establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *British Airways Board v. Boeing Co.*, 585 F. 2d 946, 951 (9th Cir. 1978); Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial* § 14:123 [hereinafter Schwarzer]. "The moving party must show there are no triable issues of fact as to matters upon which it has the burden of proof at trial." Schwarzer at § 14:124. It is the opposing party's burden to show a triable issue of fact as to matters on which it will bear the burden of proof at trial, *id.* at § 14:131; further, "a complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); Schwarzer at § 14:131.

II. Genuine Issues of Material Fact

The moving party has the burden of showing the lack of any genuine issue of material fact. Some minor facts are disputed. But just because the parties do not agree on one version of the facts does not mean that a court cannot dispose of the matter on summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. Rule 56(c). *See also Anderson*, 477 U.S. at 257 ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be a genuine issue of material fact.") (emphasis omitted).

In this case, the defendant has made a motion for summary judgment, and the plaintiffs have made a motion for partial summary judgment. The parties agree that generally, there are no genuine issues of material fact pertaining to the issue of liability. The plaintiffs do object to the City's characterization of the plaintiffs as salaried employees. This concern, however, relates not to a factual dispute, but to legal interpretation. Thus, summary judgment is appropriate.

III. The FLSA and the Salary Basis Exemption

Generally, the FLSA bars the employment of any employee for a work week longer than 40 hours unless such employee receives compensation at a rate of one and one-half times his regular rate for those hours which exceed the 40 hour workweek. *See* 29 U.S.C. § 207(a)(1). However, any employee employed in a bona fide executive, administrative or professional capacity is exempt from the 40 hour workweek limitation. *See* 29 U.S.C. § 213(a)(1).

In order to qualify for this exemption the employee must be compensated on a "salary basis." 29 C.F.R. § 541.2. Compensation on a salary basis means that the employee receives a predetermined amount for each pay period, which amount is not subject to reduction because of variation in quantity or quality of the employee's work performance. 29 C.F.R. § 541.118. Subject to some exceptions not relevant here, the employee must receive his full salary for any week without regard to the number of days or hours worked. *Id.*

Plaintiffs do not dispute that they are employed in a bona fide, administrative or professional capacity. Thus, they would be exempt from the FLSA if they are compensated on a salary basis. The plaintiffs argue that they are not paid on a salary basis, and as developed below, this question is indeed the touchstone of the dispute.

IV. Fire Protection Partial Exemption: The § 207(k) Provision

29 U.S.C. § 207(k) created a partial exemption to the overtime requirements of the FLSA to accommodate the unique schedules of public safety employees such as firefighters. In lieu of the 40 hour work week approach, § 207(k) provides:

> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities . . . if—
>
> > (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
> >
> > (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of hours referred to in clause (B) of paragraph (1) bears to 28 days,

> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

The City asserts that it "has applied the '7(k) partial exemption' to its sworn firefighters, and has adopted a 27-day work period for them." Defendant's Memorandum of Points and Authorities at 5. The City asserts that under this provision, time-and-one-half overtime is not required until 204 hours have been completed in the 27-day work period. Although 28/216 is a similar ratio to 27/204, a closer approximation is 27/208.

However, the amount of hours actually worked by the plaintiff firefighters in a 27-day period is 216. *See* Defendant's Memorandum of Points and Authorities at 20. The firefighters routinely work 4 to 12 hours of overtime per 27-day period, and are paid at their normal hourly rate. Therefore the plaintiffs do qualify for overtime pay under § 207(k).

V. Salary Basis and the Abshire Decision

A. Defining Salaried Status

The plaintiffs argue that they are not paid on a salary basis for the following reasons: (1) plaintiffs were required to maintain detailed accounts of their time; (2) they were compensated for overtime work on a hourly basis; (3) they were required to use compensable leave time; and (4) for less than one day's absence, they were docked accumulated leave or overtime in six minute increments.

The Department of Labor has recognized that certain privileges and benefits are attendant to the status of a salaried employee. In particular, payment on a salary basis carries with it the privilege that an employee has some latitude to vary his hours of work. The Department of Labor regulations describe a salaried employee as he who "receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or

part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). But this docking test is only one aspect of the salary basis characterization. The Department of Labor regulations also provide that an employee is not paid on a salary basis if the employee is subject to disciplinary suspensions without pay for reasons other than infractions of safety rules of major significance. 29 C.F.R. § 541.118(a)(5). *See also* United States Department of Labor Opinion Letter No. 1614, January 15, 1986, CCH Labor Law Reports, para. 31,741 at 43,143.

Additionally, courts have held that employees are not paid on a salary basis when the employees' pay fluctuates from pay period to pay period in relation to the number of hours worked, *Hodgson v. Baker*, 544 F.2d 429, 434 (9th Cir. 1976), and when the employee accrues and uses sick leave and vacation benefits by the hour. *Knecht v. City of Redwood City*, 683 F.Supp. 1307, 1312 (N.D.Cal. 1987). An employer's requirement that employees work a fixed schedule and for a minimum number of hours is also inconsistent with salaried status. *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991).

The hours worked by plaintiffs are controlled by the City. Plaintiffs may not absent themselves from work during the day without the permission of higher authority. Absence without excuse is subject to discipline. When plaintiffs are absent from work for a period of less than one day, such absences are deducted from accumulated leave or overtime in six minute increments. Plaintiffs must record all time spent on duty and all leaves of absence on departmental time sheets. They are compensated for overtime on a hourly basis, not on a time-and-one-half basis. They may be suspended from duty without pay as a disciplinary measure. These characteristics are plainly inconsistent with salaried status.

B. Docking Pay and Abshire

In *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785 (1991), the Ninth Circuit considered the issue of whether an employee whose compensation was subject to deduction for an absence of less than one day was considered as being paid on a salary basis for purposes of the FLSA. The court held that such an employee was not exempt from the FLSA. The exemptions to the FLSA are to be narrowly construed and employers who claim that an exemption applies to their employees must show that the employees fit " 'plainly and unmistakenly within [the exemption's] terms.' " *Abshire*, 908 F.2d at 486 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960)). Clearly, the burden is on defendants to establish that the plaintiffs fall within the salaried basis exemption. *Id.* at 485.

The *Abshire* court held that employees whose pay is subject to deduction for absences of less than a day are not paid on a salary basis according to the regulations implementing the FLSA. The City admits that it is possible for the salary of the plaintiffs to be reduced by reason of an absence of less than one day if all available paid leave categories were exhausted. *See* Defendant's Motion at 24. Furthermore, the *Abshire* court noted that additional compensation for additional hours worked is generally not consistent with salaried status. 908 F.2d at 486. The City pays the plaintiffs straight overtime for additional hours worked.

Although the City has conceded that the employees' pay could theoretically have been subject to deduction for an absence of less than one day, the City contends that there is no evidence that such a deduction occurred.[2] The County of Kern in *Abshire* presented a similar argument that

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[2] Given that the statute of limitations for violations of the FLSA is two years, or three years if the violation is willful, there is potential liability dating back to as early January 23, 1989 or 1988. *See* 29 U.S.C. § 255(a).

there was no evidence of any employee having ever been docked for partial days missed. The court noted that this argument was irrelevant because the dispositive factor was whether the employee's pay was "subject to" deduction for absences of less than a day. 908 F.2d at 487. Similarly, here, the City's argument that there is no evidence of actual docking is irrelevant because the employees were subject to having their pay reduced for partial absences. The plaintiffs' motion for partial summary judgment is concerned with liability, not damages. The issue of whether plaintiffs' pay was subject to deduction goes to liability. The issue of whether there were actually any deductions goes to damages. The City's argument is directed at damages, and in the process the City has conceded liability under *Abshire*.

The City concedes that plaintiffs' pay was subject to deduction for a part-day absence. Thus, the City has not carried its burden of proof and is liable under § 207. Under *Abshire*, plaintiffs are entitled to summary judgment on the liability issue.

V. Department of Labor's Proposed Regulations

A. Relationship to Abshire

The City argues that recently promulgated proposed regulations from the Department of Labor overrule the result in *Abshire* for public employees. On September 6, 1991, the Department of Labor published an Interim Final Rule which provides that an otherwise exempt public sector employee would not be disqualified from exemption if the employee's compensation was subject to reduction for absences of less than one day. *See* 56 Fed. Reg. 45,826 (1991) (to be codified at 29 C.F.R. § 451.5d).

Furthermore, the Department of Labor issued another Interim Final Rule which provides that the exemption will not be lost if either (1) the public employer did not make a deduction for a part-day absence prior to September 6,

1991 or (2) the employer reimburses the employee for any deduction made prior to September 6, 1991. *See* 56 Fed. Red. 45,830 (1991) (to be codified at 29 C.F.R. § 541.118 (a) (6) (ii)).

Defendant has filed the Declaration of John Hardy, the Chief Administrative Analyst in the Employee Relations Division of the Office of the City Administrative Officer, in which Hardy states that he knows of no plaintiff in the *Morsch* class action whose pay was reduced for a part-day absence. Furthermore, he states that the City is committed to reimburse any deductions in the event such deductions are found to have occurred. *See* Declaration of John Hardy at paras. 44 and 45.

Thus, the question is whether the proposed regulations should override the *Abshire* decision. If the regulations were effective, the answer would be straightforward: the regulations would override *Abshire*. However, here we are dealing with proposed regulations that have yet to be formally enacted. Moreover, at least two district courts have recently held that the regulations are invalid.

B. Validity of the Regulations

In *Service Employees Int'l. v. County of San Diego*, 92 Daily Journal D.A.R. 2824 (S.D. Cal. Feb. 13, 1992), the court found that the regulation to be codified at § 451.5d was invalid because it was promulgated without a notice and comment period. *Id.* at 2830. Further, the court refused to stay its decision pending formal enactment of the proposed regulations, which is anticipated to occur in June 1992. The court noted that the County submitted no evidence to show that there were no deductions or that the County reimbursed plaintiffs for any deductions. *Id.*

On March 20, 1992, in *Alex v. California*, Eastern District of California, CV S-89-0032 LKK, Judge Lawrence Karlton issued an order discussing this issue and reached

the same conclusion: the Department of Labor's proposed regulations are invalid because they were promulgated without a notice and comment period. In fact, it appears that the regulations are invalid for our present purposes.

Under the "informal rulemaking" provisions of the Administrative Procedure Act, an agency must provide the public with notice and the opportunity to comment on the proposed rules. 5 U.S.C. § 553(b) & (c). After consideration of relevant comments, the agency may then adopt a final rule, along with a concise general statement of its basis and purpose. *Id.* § 553(c); *San Diego Air Sports Center, Inc. v. FAA*, 887 F.2d 966 (9th Cir. 1989). A substantive rule is invalid if the agency has failed to comply with the notice and comment procedures or if good cause has not been articulated or does not exist. *Linoz v. Heckler*, 800 F.2d 871, 878 (9th Cir. 1986).

In promulgating the Interim Rule, the Department of Labor determined that because "prior notice and comment are contrary to the public interest," good cause existed for dispensing with the notice and comment period. 56 Fed. Reg. 45,825. Exceptions to 5 U.S.C. § 553 are "narrowly construed and only reluctantly countenanced." *San Diego Air Sports*, 887 F.2d at 969. The good cause exception is "emergency procedure." *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982). The Department of Labor's effort to sidestep the notice and comment period is particularly egregious since the interests of thousands of employees were directly affected.

The *Service Employees Int'l. v. County of San Diego* and *Alex v. California* cases have correctly analyzed the validity of the Interim Rule. This Court considers the regulation invalid.

C. Impact of the Regulations

Even if this Court were to consider the regulations, the impact on the analysis is narrow. The Interim Rule limits itself to situations where the plaintiff is "other-

wise exempt." The docking of pay is not the only characteristic of a salary basis. As discussed above, other characteristics can also indicate a salary basis. In this case, the plaintiffs were paid overtime, and had little control over their schedule. These and other characteristics suggest that the plaintiffs were not salaried employees.

The City has not met its *Abshire* burden of proof of establishing that the plaintiffs are salaried employees. The plaintiffs are nonsalaried employees, and the City must pay them time-and-one-half overtime compensation.

VI. Interlocutory Appeal

28 U.S.C. § 1292(b) (emphasis omitted) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order: Provided however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Defendant argues that the *Abshire* decision is contrary to the intent of Congress in the sense that Congress surely did not intend that almost every public employee be compensated time-and-one-half for overtime. This position is debatable, but supported to a degree by the Labor Department's attempt to interpret the FLSA. As noted above, this issue has become a focus for other litigation as well as the present case. This Court is of the opin-

ion that the order granting the plaintiffs' cross-motion for partial summary judgment involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. Therefore, the order is CERTIFIED for appeal.

Conclusion

For the reasons discussed above, the defendant's motion for summary judgment is HEREBY DENIED. The plaintiff's motion for partial summary judgment is HEREBY GRANTED. The order is CERTIFIED for interlocutory appeal. The action is STAYED pending the appeal.

IT IS SO ORDERED.

Dated: May 4, 1992

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge